No. 80-148

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS, PETITIONER

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a warrantless search, based upon probable cause, of plastic-wrapped parcels found in petitioner's automobile during a lawful search of the automobile was reasonable under the circumstances presented and thus permissible under the Fourth Amendment.

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INTEREST OF THE UNITED STATES

This case presents an important and frequently recurring question of Fourth Amendment law concerning the necessity of procuring a warrant in order to conduct a search upon probable cause of a parcel, bag, or other insubstantial or insecure container not commonly used as a place of safekeeping for personal effects. Although the court below held that the warrantless search of packages containing marijuana bricks was permissible because their outward appearance strongly suggested that they contained marijuana (Pet. App. A-6), the case presents the broader question whether a warrant must ordinarily be obtained in order to examine, with probable cause, the con-

tents of insubstantial packages and containers that are not the functional equivalent of luggage.

This Court's observation in *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979), that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment" has spawned a host of decisions in the lower courts classifying various containers, distinguishing between those in which an individual's privacy rights are sufficient to justify requiring that a warrant be obtained, where feasible, prior to any search, and those whose less private character permits a search on probable cause subject only to post-search judicial scrutiny. For the most part, these decisions hold warrants required to search containers that are, by their appearance or accepted use, comparable to personal luggage, but that society is not prepared to recognize a comparable privacy interest in other less substantial or private containers. See pages 9-10, and notes 3 & 5, *infra*. Whether the need to obtain a warrant before searching a container following its lawful seizure turns upon its status as a "common repository for one's personal effects," *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, or whether a different standard should govern, is a question of considerable importance for federal law enforcement activities.

STATEMENT

Following denial of his motion to suppress evidence and a jury trial, petitioner was convicted in the Superior Court for Solano County, California, upon charges of possession of marijuana, possession of marijuana for sale, and transportation of marijuana, in violation of Sections 11357, 11359 and 11360, re-

spectively, of the California Health and Safety Code (West 1975). The Court of Appeal affirmed the judgment. This Court granted petitioner's prior petition for certiorari, 443 U.S. 903 (1979), vacated the judgment of the Court of Appeal, and remanded the case for further consideration in light of *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). On remand the Court of Appeal adhered to its prior decision in relevant respects (Pet. App. A-1 to A-13). The California Supreme Court declined to review the decision of the Court of Appeal (Pet. App. A-14).

1. The evidence at the suppression hearing established that in the early morning hours of January 5, 1975, two California Highway Patrol officers stopped petitioner's station wagon after observing him driving erratically. After meeting the officers between the vehicles, petitioner began talking rapidly and exhibited difficulty in removing his license from his wallet. When petitioner returned to his vehicle to secure his vehicle registration and opened the door, one of the officers smelled marijuana smoke and observed on the front seat a pair of tweezers of the type used to hold marijuana roaches. He also found a pair of tweezers holding a burned, hand-rolled cigarette butt, an alligator clip, a hand-rolled cigarette, and a cookie tin containing marijuana seeds, two packs of cigarette papers, and a plastic baggie containing marijuana, all in the passenger compartment (Pet. App. A-2 to A-3).

While one officer was retrieving these objects, petitioner stated to the other officer: "What you are looking for is in the back." Petitioner was placed in the patrol car, and an officer opened the luggage compartment of his station wagon. In it he found a tote bag and two bulky packages wrapped in opaque,

green plastic and covered by an outer layer of transparent plastic. Each layer of plastic was sealed on the outside with a strip of tape. The officer opened all the packages. Each plastic-wrapped package contained a 15-pound block of marijuana; the tote bag contained approximately three pounds of marijuana (Pet. App. A-3, A-5, A-11 to A-12).

2. After this Court's remand, a divided Court of Appeal upheld the search of the plastic-wrapped packages,[1] distinguishing the luggage held to have been improperly searched in *Arkansas* v. *Sanders*, *supra*. Relying on the language in that decision that "some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance" (Pet. App. A-4, quoting 442 U.S. at 764-765 n.13), the Court of Appeal reasoned (Pet. App. A-6) that

> the very appearance of a bulky, fifteen pound, brick-shaped, plastic-wrapped package suggested that it contain[ed] a specific type of contraband (a brick of marijuana). * * * Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana.[2] The parcels thus could not support a reasonable expectation of privacy and were not protected by the Fourth Amendment.

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[1] On remand, the State conceded that the warrantless searches of the cookie tin and tote bag were improper (Pet. App. A-6). The correctness of those concessions is not before this Court.

[2] During the suppression hearing, the officer who opened the packages testified that he had heard that blocks of marijuana were customarily wrapped and transported in this manner (A. 41).

SUMMARY OF ARGUMENT

The California Court of Appeal reached the correct result in this case by applying, in response to this Court's remand, the exception to the warrant requirement noted in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13, applicable to containers and packages whose very nature does not "deserve the full protection of the Fourth Amendment." In *Sanders*, this Court left to the lower courts the job of "determining which parcels taken from an automobile require a warrant for their search and which do not." *Ibid.* In response to this mandate, the state and federal courts have distinguished between containers akin to luggage, or that normally function as respositories for personal effects or papers, as to which a warrant is required, and insubstantial or insecure paper or plastic bags and packages, which ordinarily do not support expectations of security, integrity and privacy sufficient to require that the existence of probable cause be determined by a magistrate in advance of the search.

These decisions, including the decision of the Court of Appeal in this case, are sound and supported by the applicable decisions of this Court. Considering traditional indicia of Fourth Amendment protection, including the precautions taken by an individual claiming Fourth Amendment protection to preserve privacy, the conduct of the individual, and applicable property rights, see *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring), the lower courts have properly concluded that packages such as those at issue here do not fall within the protection of the Warrant Clause. The traditional uses of containers such as paper bags, and their inherent insecurity and impermanence, set them apart from containers

such as the luggage that was searched in *Arkansas* v. *Sanders*, *supra*, and *United States* v. *Chadwick*, 433 U.S. 1 (1977). The configuration and use of such casual containers militates against extending the warrant requirement, applied to luggage in *Chadwick* and *Sanders*, to the plastic wrapped parcels at issue here. Nothing in petitioner's conduct signaled that he viewed these parcels as matter deserving of protection on a par with luggage. Indeed, petitioner volunteered their location and clearly implied that they contained contraband, in a spontaneous declaration to the officers.

The conclusion that petitioner's packages were not invested with sufficient attributes of privacy to require a warrant prior to their search upon probable cause is considerably reinforced by the fact that their inspection was part of a search of petitioner's automobile that was lawful without a warrant under the Fourth Amendment. It is true, as the Court held in *Sanders*, that the mere fact that a container has been found in or seized from an automobile does not *ipso facto* remove the requirement—applicable if the container were found elsewhere—that a warrant be procured. But this was because the container in *Sanders*, personal luggage, is a common repository for personal effects, invested by society with markedly higher privacy value than the automobile itself. Insubstantial containers such as petitioner's plastic-wrapped brick of marijuana, on the other hand, are not accompanied by the same substantial societal privacy expectations and cannot meaningfully be differentiated, for purposes of determining whether a warrant should be required, from such areas as the locked trunk or glove compartment of the automobile. Accordingly, unlike the situation in *Sanders*, the same general

considerations that allow a warrantless probable cause search of an automobile justify treatment of containers such as petitioner's on the same basis.

ARGUMENT

THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICIALS TO CONDUCT WARRANTLESS SEARCHES, BASED ON PROBABLE CAUSE, OF INSUBSTANTIAL CONTAINERS NOT COMMONLY RECOGNIZED AS REPOSITORIES FOR PERSONAL EFFECTS

The decision of the California Court of Appeal turned on the court's conclusion, disputed by the dissenting judge, that the parcels searched here are the kind of containers as to which no warrant is necessary to support a probable cause search because their content is evident from the nature of the container. See *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13. But the facts of this case, and the questions presented by petitioner, raise the more general issue whether packages or containers lawfully seized can be opened on the basis of probable cause, but without a warrant, where the nature of the package, its location, the lack of precautions taken to assure privacy, or the behavior of the person claiming Fourth Amendment protection indicate the absence of that legitimate expectation of a high level of privacy which has traditionally been guarded by the warrant requirement. Accordingly, the focus of our argument is only incidentally upon those special characteristics of the parcels at issue here that indicated their contents, but more generally addressed to the limited privacy interest that attaches to packages and containers of their general character, which are not commonly considered to be repositories for personal effects.

1. The Fourth Amendment has been interpreted to require that "normally searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 758 (footnote omitted). Accordingly, on two recent occasions this Court has held that absent exigent circumstances, consent, or circumstances constituting a proper search incident to an arrest, a warrant is required before law enforcement officials may search luggage, even though they have probable cause to believe that it contains contraband or evidence of a crime, and even though the luggage is taken from a motor vehicle by police. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762-766 (suitcase); *United States* v. *Chadwick*, 433 U.S. 1 (1977) (double-locked footlocker). Noting that the established "automobile exception" to the warrant requirement rests in part on the "configuration, use, and regulation of automobiles [which] often may dilute the reasonable expectation of privacy that exists with respect to differently situated property," *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761, the Court declined to extend the automobile exception to luggage, observing that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, citing *United States* v. *Chadwick*, *supra*, 433 U.S. at 13. Because society recognizes luggage as a personal sanctuary, its placement in an automobile does not vitiate the reasonable and substantial expectation of privacy associated therewith. Accordingly, the fact that a suitcase is lawfully seized from an automobile based upon probable cause does not justify dispensing with the warrant requirement. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762.

On the other hand, the Court made it clear that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment," offering by way of example

> containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. * * * There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched * * *.

Arkansas v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13. While this caveat left the status of containers other than personal luggage "hanging in limbo," *id.* at 768 (Blackmun, J., dissenting), the lower courts have shouldered the task of determining which kinds of containers and packages activate the warrant requirement of the Fourth Amendment. Invalidation of warrantless probable cause searches has generally been reserved for searches of containers that normally function as repositories for personal effects or papers, or that represent the functional equivalent of luggage, such as suitcases, briefcases, purses, duffle bags, knapsacks, and gym bags.[3] With the exception

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[3] See, *e.g.*, *United States* v. *Ross*, No. 79-1624 (D.C. Cir., Apr. 17, 1980), (leather pouch; collecting cases) (panel opinion), adhered to in relevant part on rehearing en banc (Mar. 31, 1981); *United States* v. *Presler*, 610 F.2d 1206 (4th Cir. 1979) (briefcases); *United States* v. *Miller*, 608 F.2d 1089

of the en banc decision by the District of Columbia Circuit in *United States* v. *Ross*, No. 79-1624 (Mar. 31, 1981),[4] the courts of appeals have uniformly declined to extend the warrant requirement to paper and plastic bags and packages.[5]

2. In drawing this line, the courts of appeals have been guided not only by the language of *Sanders* but by the factors that have traditionally been employed to determine the scope of Fourth Amendment protec-

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(5th Cir. 1979) (portfolio); *United States* v. *Montano*, 613 F.2d 147 (6th Cir. 1980) (suitcase); *United States* v. *Meier*, 602 F.2d 253 (10th Cir. 1979) (knapsack).

[4] The decision of the en banc court of appeals in *Ross*, overturning the panel decision and creating a conflict among the courts of appeals, was rendered just before this brief was completed. Accordingly, unless otherwise indicated, references in this brief to *Ross* refer to the panel opinion. We remain convinced that the panel opinion was sound in its conclusions regarding the status of paper bags under the Fourth Amendment.

[5] See *United States* v. *Ross*, *supra* (paper bag; collecting cases) (panel opinion), overturned in relevant part on rehearing en banc (Mar. 31, 1981); *United States* v. *Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (paper bag); *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) (plastic and paper bags); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (plastic bag); *United States* v. *Markland*, 635 F.2d 174 (2d Cir. 1980) (beverage bag); *United States* v. *Bush*, Nos. 80-1116, etc. (3d Cir. Mar. 24, 1981) (cardboard box); *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) (pharmacy bag); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) (closed paper bag); *United States* v. *Jimenez*, 626 F.2d 39 (7th Cir. 1980) (paper bag); *United States* v. *Mackey*, 626 F.2d 684 (9th Cir. 1980) (same); *United States* v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) (same); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979) (plastic bags of marijuana); but cf. *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), adhered to on rehearing, 615 F.2d 10 (1980).

tion: the precautions taken to preserve privacy, the manner in which the interested individual has employed the object or location to be searched, and applicable property rights insofar as they also reflect widely-shared privacy expectations. See *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring). Particularly significant has been the individual's demonstrated interest or lack of interest in assuring privacy, as evidenced by the nature of the container chosen. For instance, in distinguishing a paper bag from the luggage at issue in *Sanders*, the panel in *Ross* noted that

> paper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break open very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

United States v. *Ross*, *supra*, slip op. 14 (citation omitted).[6] Accord: *United States* v. *Goshorn*, 628 F.2d 697, 700 (1st Cir. 1980); *United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980).

In determining whether a warrant is required to conduct a probable cause search of an insubstantial or insecure container, the courts of appeals have also looked to the conduct of the individual claiming

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[6] See note 4, *supra*.

Fourth Amendment protection, insofar as it reflects his or her expectations of privacy. For instance, in *United States* v. *Jimenez*, 626 F.2d 39, 41 (7th Cir. 1980), the court of appeals' conclusion that the defendant lacked a high expectation of privacy regarding the contents of a paper bag she had been observed placing in her automobile trunk was supported in part by defendant's acknowledgement that the bag contained contraband. See also *United States* v. *Gaultney*, 581 F.2d 1137, 1143 (5th Cir. 1978). On the other hand, in *United States* v. *Dien*, 609 F.2d 1038, 1045 (2d Cir. 1979), the court held that the defendants had manifested a reasonable expectation of privacy by placing marijuana in sealed cardboard boxes secreted behind a plywood partition and painted-over windows in a truck.[7] See *United States* v. *Ross*, *supra*, slip op. 15 nn.5 & 6.

3. Contrary to petitioner's contention (Br. 24-40), the decisions of the lower courts applying these criteria do not depart from the teachings of this Court. First, petitioner errs in assuming (Br. 48) that the examples given in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13, of containers that do not command "the full protection of the Fourth Amendment" are exhaustive. This Court clearly signaled that it did not mean to decide all future cases, offering only examples of instances where diminished privacy expectations justify dispensing with a warrant and deliberately leaving the application of the general principle announced to development in the lower courts.

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[7] Without acknowledging that *Dien* was correctly decided, we cite it simply to illustrate the kind of inquiry employed by the courts of appeals to determine whether an expectation of privacy protected by the Warrant Clause was attached to a container that has been searched.

Ibid. In response to that mandate, the lower courts have, with substantial uniformity, distinguished between substantial sealed containers vested with the full privacy attributes of luggage on the one hand, and such containers as paper bags and casually wrapped packages on the other. See notes 3 and 5, *supra.* The resulting body of law provides a serviceable and fair means of distinguishing between those instances in which a warrant is required and those where none is required.

Petitioner errs as well in suggesting (Br. 36-40) that the basic criterion applied—whether the individual claiming Fourth Amendment protection had a reasonable expectation of privacy—is applicable only to the threshold question whether or not a search has occurred, and not to the question whether a warrant is required for a probable cause search. Indeed, in both *Arkansas* v. *Sanders, supra,* 442 U.S. at 764-765 n.13, and *United States* v. *Chadwick, supra,* 433 U.S. at 13, this Court applied the reasonable expectation of privacy test to determine whether or not an examination acknowledged to be a search subject to the Fourth Amendment was permissible absent a warrant. See also *Rakas* v. *Illinois, supra,* 439 U.S. at 152. (Powell, J., concurring). Similarly, the automobile exception to the warrant requirement has been expressly attributed to the lessened expectation of privacy inhering in automobiles, and plainly does not turn on any conclusion that no search is involved. *Cardwell* v. *Lewis,* 417 U.S. 583, 590 (1974) (opinion of Blackmun, J.); *Cady* v. *Dombrowski,* 413 U.S. 433, 442 (1973); cf. *South Dakota* v. *Opperman,* 428 U.S. 364, 367 (1976). Reduced expectations of privacy also justify warrantless administrative searches of pervasively regulated businesses. *United States* v. *Biswell,* 406 U.S. 311, 316 (1972); *Colonnade Cater-*

ing Corp. v. *United States*, 397 U.S. 72, 74, 77 (1970).

The decision of the California Court of Appeal, like the numerous decisions of the United States Courts of Appeals holding no warrant required for searches of various kinds of bags and insecure parcels, rests fundamentally upon the "configuration * * * [and] use" of the containers involved, a fundamental basis for the automobile search exception. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761. Just as an automobile operated on public roads must, as a practical matter, be deemed subject to a degree of official and unofficial scrutiny quite different from that affecting a home or office, *Carroll* v. *United States*, 267 U.S. 132, 153 (1925); *Chambers* v. *Maroney*, 399 U.S. 42, 48 (1970), a plastic bag or parcel lacks the integrity, privacy and security attributes of luggage that explain the results in *Chadwick* and *Sanders*. See 442 U.S. at 764.

To be sure, various types of containers besides suitcases and footlockers—such as briefcases, knapsacks, and duffle bags—may be "inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, quoting *United States* v. *Chadwick*, *supra*, 433 U.S. at 13. In general, such items are repositories for clothing, toiletries, personal or business records, and the most intimate of items associated with daily living. The same, however, cannot be said of paper grocery sacks, plastic bags, or packages of a similar nature. The intended and typical function of these containers is to facilitate the movement of merchandise, or to contain bulk items.[8]

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[8] The dissenting judge in the Court of Appeal likened the photograph of the package in this case to a package of highway flares he had recently purchased (Pet. App. A-11). Whatever force this observation may have to rebut the majority's conclusion that the package manifestly contained a brick of

We recognize, of course, that a common grocery bag or a similar container may at times be pressed into service as a repository for personal effects. But such atypical use, without more, does not invest such containers with the protection of the Warrant Clause, for unrepresentative use is not part of the conventional "understandings that are recognized and permitted by society," which are the touchstone for assessing the scope of Fourth Amendment protection. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12.[9]

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marijuana (and the dissenter overlooked the fact that the officer could feel as well as see the package), it simply highlights the fact that parcels of this sort are generally unlikely to have very private contents.

[9] For instance, we doubt that one who chooses to live in his automobile would thereby render the automobile search exception inapplicable to the contents of his automobile. This case does not present the question whether, by reason of particular features, the appearance of a parcel, its surroundings, the conduct of the person claiming Fourth Amendment protection or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily employed for non-private use as to compel law enforcement officers to procure a warrant prior to initiating a search. See *United States* v. *Markland*, *supra*, 635 F.2d at 177; *United States* v. *Ross*, *supra*, slip op. 15-16 & n.6. It may be, for instance, that the markings or appearance of a parcel may make it apparent that it is destined for dispatch by mail—a status that accords it full protection under the Warrant Clause. See, *e.g.*, *Ex parte Jackson*, 96 U.S. 727, 733 (1878). Or the construction of the container, the precautions taken to seal and secrete it, or its markings may demonstrate that the owner desires to retain a high degree of privacy with regard to its contents. See *United States* v. *Dien*, *supra*, 609 F.2d at 1044-1045 (defendant manifested an expectation of privacy by securely taping cardboard boxes and secreting them behind a plywood barrier in a vehicle whose windows had been blacked out; but see note 7, *supra*). Finally, in some cases, the owner's circumstances or his surroundings might make it apparent that a paper bag or similar con-

The very nature of such containers is at odds with a reasonable expectation that their contents will be protected from public exposure. Unlike a suitcase, footlocker or other types of luggage, paper bags and similar packages offer at best only minimal protection against accidental or deliberate intrusion. Such items cannot be latched or secured. They are easily torn, resulting in spillage of their contents or their disclosure to public view. Indeed, their contents frequently can be discerned merely by observing, holding, or feeling them.[10] In short, "it is doubtful that one realistically can expect a paper bag [or a container of a similar character] to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands." *United States* v. *Ross*, *supra*, slip op. 14; see *United States* v. *Mannino*, *supra*, 635 F.2d at 114; *United States* v. *Honigman*, *supra*, 633 F.2d at 1338; *United States* v. *Mackey*, *supra*, 626 F.2d at 687; see also, 2 W. LaFave, *Search and Seizure*, § 5.5, at 365 (1978).

The principal function served by the warrant in the case of a search of a seized container is as prophylaxis against misjudgment by overzealous officers regarding the existence of a reasonable basis in

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tainer is a repository for his personal effects. Where these or similar objective factors indicating the special status of a paper bag or similar package are present, procurement of a warrant may be necessary before proceeding with a search. In the absence of such circumstances, the owner's subjective expectation of privacy in such a parcel is insufficient to trigger the warrant requirement.

[10] Thus once it is granted, as in the case here, that such a parcel has been lawfully seized, the contents are likely, given the nature of the container, to be largely disclosed to an officer's sense of touch. Such vulnerability to at least partial disclosure of a container's contents without even opening it suggests a considerably reduced privacy value when compared with luggage.

known facts to justify the search. In some proportion of cases, the interposition of a neutral and detached magistrate will serve to prevent an unreasonable invasion of privacy. A warrant is required in cases involving luggage because of the judgment that the costs of an unjustified search of such a high privacy area are unacceptable, and the prophylaxis of the warrant requirement has great value when it prevents such unjustified intrusions. But the costs associated with a mistaken invasion of relatively low privacy areas are substantially less, and the benefits to be gained by requiring a warrant are therefore greatly diminished.

Accordingly, in contrast with luggage, when a paper bag or container of similar material or construction comes legitimately into the hands of the police, the owner's residual expectation of privacy is justifiably overcome where, as here, the search is based upon probable cause. Compare *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764. Such a privacy interest, absent unusual circumstances, is simply insufficient to merit the protection of the Warrant Clause of the Fourth Amendment. See *Cardwell* v. *Lewis*, *supra*, 417 U.S. at 590-592 (opinion of Blackmun, J.) (diminished expectation of privacy in exterior of motor vehicle permits warrantless examination of paint and tire treads where probable cause exists); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978) (expectation of privacy in motor vehicle insufficient to require warrant for attachment of beeper where probable cause exists).[11]

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[11] We stress that such privacy interests are not unprotected by the Fourth Amendment. Even absent a reasonable expectation of a high degree of privacy, an intrusion into such a package must still satisfy the general reasonableness requirement of the Fourth Amendment. See *United*

4. Application of these principles to this case suggests the correctness of the result reached below. The containers at issue were plastic wrapped parcels. Nothing about their appearance suggested that they served as the functional equivalent of luggage or as repositories of personal effects. The plastic material involved did not constitute a secure permanent barrier against breakage or entry.[12] Neither the physical appearance of the package nor the surrounding circumstances suggest that petitioner regarded these packages as equivalent to luggage in function or invested with a comparable degree of privacy. The outward appearance of petitioner's parcels indicated that their contents were likely a single, bulky, brick-shaped object, rather than personal effects. Indeed, petitioner's spontaneous statement (Pet. App. A-3) to an officer of the California Highway Patrol that "[w]hat you are looking for is in the back" precludes any claim that petitioner held such an expectation of privacy. *United States* v. *Jimenez, supra*, 626 F.2d at 41; *United States* v. *Gaultney, supra*, 581 F.2d at 1141.[13] Nor is the fact that tape was affixed to the

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States v. *Mannino, supra*, 635 F.2d at 113; *United States* v. *Markland, supra*, 635 F.2d at 176 (search in fulfillment of police duty to protect the property of citizens). See *Cardwell* v. *Lewis, supra*, 417 U.S. at 592 (opinion of Blackmun, J.). Here, of course, it is undisputed that the search was supported by probable cause. Where reasonable justification is lacking, the fruits of a search are subject to suppression and a civil damage remedy may be available.

[12] There is in any event no record support for petitioner's claim (Br. 26 n.2) that the packages at issue were wrapped "in heavy duty plastic similar to a type used in commercial packaging."

[13] The State of California did not urge below that the search was consented to. Accordingly, the question whether

plastic wrapping of the petitioner's package controlling here. While, under some circumstances, sealing a package with tape might manifest the owner's special expectation of privacy respecting the contents of the package, see *United States* v. *Ross*, *supra*, slip op. 15-16 n.6, it appears that tape was used here simply to form a container and prevent spillage. Unlike a latch or lock on a piece of luggage, which permits security while making it possible for authorized persons to open and close the container, and reuse it, a taped parcel simply maintains the contents intact. Under these circumstances, taping itself is insufficient to establish the expectation of privacy necessary to bring the Warrant Clause into play.[14]

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petitioner's spontaneous statement provides an independent basis for dispensing with a warrant is not presented here. Compare *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-490 (1971).

[14] The respondent did not urge in the Court of Appeal that *Chadwick* and *Sanders* are inapplicable to the search at issue, notwithstanding the fact that the search was conducted and the motion to suppress denied well before either of those cases was decided. This contention was raised in the State's opposition to petitioner's earlier petition for certiorari, No. 78-567, but was not pressed upon remand, apparently because of the intervening decision of the California Supreme Court in *People* v. *Minjares*, 24 Cal. 3d 410, 421 n.6, 591 P.2d 514, 519 n.6, 153 Cal. Rptr. 224, 229 n.6, cert. denied, 444 U.S. 887 (1979), holding, incorrectly in our view, that *Chadwick* is to be applied retroactively.

Assuming that the issue may be reached in this Court, as we think it may, see *Bowen* v. *United States*, 422 U.S. 916, 920-921 (1975); *Bondholders Committee* v. *Commissioner*, 315 U.S. 189, 192 n.2 (1942), the judgment could properly be affirmed on the ground that *Chadwick* and *Sanders* should not be given retroactive effect. As evidenced by the original decision of the Court of Appeal in this case (78-567 Pet. App. iv), the

5. Our argument thus far has addressed the question whether warrantless searches of containers such

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warrantless search of the package at issue here was deemed to fall within the automobile search exception of *Carroll, supra,* and *Chambers* v. *Maroney, supra,* prior to this Court's decision in *Sanders.* (Indeed, prior to *Sanders* the United States Court of Appeals for the Ninth Circuit interpreted *Chadwick* as inapplicable to a search even of luggage found during an automobile search. *United States* v. *Finnegan,* 568 F.2d 637 (9th Cir. 1977); but see *People* v. *Minjares, supra.* This uncertainty as to the scope of *Chadwick* occasioned the grant of certiorari in *Sanders, supra,* 442 U.S. at 754 n.1.) Prior to *Chadwick* the courts of appeals generally construed the automobile search exception to encompass searches of briefcases and luggage found within automobiles. *United States* v. *Chadwick, supra,* 433 U.S. at 23 n.4 (Blackmun, J., dissenting; collecting cases); *United States* v. *Evans,* 481 F.2d 990, 993-994 (9th Cir. 1973). Accordingly, *Chadwick* and *Sanders* established new law for California. See *United States* v. *Stewart,* 595 F.2d 500, 503-504 (9th Cir. 1979) (*"Stewart I"*); *United States* v. *Stewart,* No. 79-2710 (9th Cir. Mar. 2, 1981) (*"Stewart II"*); but see *People* v. *Minjares, supra,* 24 Cal. 3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal. Rptr. at 229 n.6; cf. *United States* v. *Medina-Verdugo,* Nos. 79-1042, 79-1309 & 79-1314 (9th Cir. Oct. 23, 1980). In this case, retroactive application of *Chadwick* and *Sanders,* if extended to cover insubstantial containers, would result in suppression of relevant evidence without providing any deterrent against unlawful searches or protecting the integrity of the courts. It would retard, rather than advance the truth-finding function of the criminal trial. Moreover, there is no suggestion that the police officers who searched petitioner's parcel acted in less than good faith. Accordingly, there is no occasion to apply *Chadwick* or *Sanders* to probable cause searches undertaken prior to the decision in *Chadwick.* See *United States* v. *Peltier,* 422 U.S. 531, 535-539 (1975); *Stewart I, supra,* 595 F.2d at 503-504; *Stewart II, supra,* slip op. 593-596; *United States* v. *Calandrella,* 605 F.2d 236, 250-253 (6th Cir.), cert. denied, 444 U.S. 991 (1979) (collecting cases); *United States* v. *Berry,* 571 F.2d 2 (7th Cir.), cert. denied, 439 U.S. 840 (1978); but see *United States* v. *Schleis,* 582 F.2d

as petitioner's parcel of marijuana are unreasonable per se under the Fourth Amendment in the absence of

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1166, 1173-1174 (8th Cir. 1978); *People* v. *Minjares, supra,* 24 Cal. 3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal. Rptr. at 229 n.6.

As the Sixth Circuit and the Ninth Circuit have noted, *Calandrella, supra,* 605 F.2d at 252; *Stewart II, supra,* slip op. 594, the retroactivity issue was not presented by the State's petition in *Sanders* or adverted to in the Court's opinion, even though the search there at issue antedated *Chadwick.* The decision in *Sanders* accordingly does not bespeak any view on the retroactivity question. Nor, plainly, does this Court's remand (433 U.S. 905 (1977)) of an earlier decision by the Eighth Circuit in *Schleis, supra,* for reconsideration in light of *Chadwick,* or the remand in this case for reconsideration in light of *Sanders,* indicate any view on the retroactivity question. *United States* v. *Calandrella, supra,* 605 F.2d at 252; but see *People* v. *Minjares, supra,* 24 Cal. 3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal. Rptr. at 229 n.6. In *Bowen* v. *United States, supra,* this Court originally remanded (413 U.S. 915 (1973)) the case to the Ninth Circuit for reconsideration in light of *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973). It subsequently held *Almeida-Sanchez* non-retroactive (*United States* v. *Peltier, supra*) and, indeed, criticized the court of appeals for reaching the merits of Bowen's Fourth Amendment claims on the remand. See 422 U.S. at 920-921.

We note as well that petitioner's contention (Br. 60-68) that the California Court of Appeal impermissibly strayed from the mandate of this Court, when it reinstated its judgment relying upon language in *Sanders,* is frivolous. Plainly, this Court's action in vacating the Court of Appeal's prior judgment and remanding for reconsideration in light of *Sanders* required the court of appeal to consider all aspects of *Sanders.* If this Court had meant to direct reversal of the original appellate judgment in this case, as petitioner effectively suggests, ample means for expressing that intention were available. Petitioner's reliance on *NAACP* v. *Alabama ex rel. Patterson,* 360 U.S. 240, 244 (1959), is misplaced.

consent or exigent circumstances. If our arguments are sound, warrantless probable cause searches of such containers comport with the Fourth Amendment regardless of the location in which the container is found or from which it is seized. But the argument has special force in the context of the present case, where the officers had probable cause to search an automobile, and the container within was one of the places where they could reasonably expect to find the contraband for which they were searching. See *Arkansas* v. *Sanders, supra,* 442 U.S. at 767-768 (Burger, C.J., concurring in the judgment). If, as is well settled, the privacy interest in an automobile is sufficiently limited that probable cause suffices to justify a warrantless search of its interior, including a locked trunk or glove compartment (*e.g., Chambers* v. *Maroney, supra,* 399 U.S. at 48-51; *Cooper* v. *California,* 386 U.S. 58 (1967); *Carroll* v. *United States, supra,* the imposition of a warrant requirement respecting containers located in the automobile is logical only upon a conclusion that those containers have substantial independent privacy attributes that require that they receive additional Fourth Amendment protection.

The structural integrity and privacy expectations invested in a suitcase or footlocker make it reasonable to discount their location in an automobile by requiring that a warrant be obtained to complete their search, absent exigent circumstances. *Arkansas* v. *Sanders, supra,* 442 U.S. at 765. But the insub-

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There this Court held that the Supreme Court of Alabama was barred by this Court's earlier reversal, 357 U.S. 449 (1958), of the state court's decision from "re-examining the grounds" of this Court's earlier decision. No such re-examination of settled questions has occurred here.

stantial plastic wrappings in which petitioner had bundled his marijuana brick did not meaningfully differentiate their contents from the other contents of petitioner's automobile. The nature of petitioner's parcel accordingly would not support a confident expectation that its contents would remain separate from the contents of the car in which it had been placed. See *United States* v. *Mackey, supra,* 626 F.2d at 687; cf. *Arkansas* v. *Sanders, supra,* 442 U.S. at 766-768 (Burger, C.J., concurring).

While the placement of a container within an automobile does not automatically deprive its contents of the level of protection afforded to such a container in another setting, the decision to carry a parcel such as petitioner's in an automobile, which by reason its "configuration, use, and regulation" dilutes any expectation of privacy in its contents, *Arkansas* v. *Sanders, supra,* 442 U.S. at 761, nonetheless reflects petitioner's failure to take such precautions to maintain his privacy as would manifest that expectation of a high degree of privacy protected by the Warrant Clause of the Fourth Amendment. See *Rakas* v. *Illinois, supra,* 439 U.S. at 152-153 (Powell, J., concurring). Accordingly, the setting in which petitioner's parcel was discovered provides an additional indication that a warrantless search was reasonable in the circumstances of this case.[16]

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[16] Yet another circumstance which indicates that petitioner could have little legitimate expectation of privacy in the contents of his parcels is the fact that they contained only contraband. Contraband is material whose very possession law proscribes and to whose possession " 'the government is entitled.' " *Carroll* v. *United States, supra,* 267 U.S. at 149, quoting *Boyd* v. *United States,* 116 U.S. 616, 623 (1886). California has provided by statute that controlled substances

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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and their containers are subject to forfeiture; warrantless seizures are authorized in some instances. Cal. Health & Safety Code § 11470 (West Cum. Supp. 1981). Although marijuana is not technically classified as a controlled substance, provision is made for disposition of marijuana that comes into the hands of police. Cal. Health & Safety Code § 11478 (West Cum. Supp. 1981). In *Cooper* v. *California*, 386 U.S. 58, 60-61 (1967), a warrantless search of an automobile was upheld based on other provisions of California law which authorize seizure and forfeiture of any vehicle used for transportation of narcotic substances. Each of these statutory provisions reflects the diminished property rights society recognizes in contraband materials, and they indicate that such materials cannot support a substantial expectation of privacy. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 153 (Powell, J., concurring). Where, as here, the wrappings in which contraband is placed do not themselves reflect an expectation of substantial privacy respecting their contents, and in fact permit an observer to discern the contraband contents without opening the parcel, the ensuing warrantless search was reasonable and thus permissible under the Fourth Amendment.

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